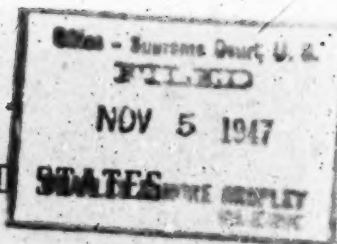




FILE COPY

SUPREME COURT OF THE UNITED

OCTOBER TERM, 1947



No. 13

THE UNITED STATES OF AMERICA,

vs.

*Appellant,*

UNITED STATES GYPSUM COMPANY; NATIONAL  
GYPSUM COMPANY; CERTAIN-TEED PRODUCTS  
CORPORATION; THE CELOTEX CORPORATION;  
EBSARY GYPSUM COMPANY, INC.; NEWARK  
PLASTER COMPANY; SAMUEL M. GLOYD, DOING  
BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER  
COMPANY; SEWELL L. AVERY; OLIVER M. KNODE;  
MELVIN H. BAKER; HENRY J. HARTLEY; FRED-  
RICK G. EBSARY; AND FREDERICK TOMKINS

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF COLUMBIA

**SUPPLEMENTAL BRIEF FOR THE CELOTEX  
CORPORATION**

ANDREW J. DALLSTREAM,  
WALTER G. MOYLE,  
RALPH P. WANLASS,  
FREDERIC H. STAFFORD,  
*Attorneys for Appellee,*

*The Celotex Corporation,*

*1109 Warner Bldg.,*

*Washington 4, D. C.*

November, 1947.



## INDEX

	Page
I. Preliminary statement	1
II. Statement	2
III. Summary of argument	4
IV. Argument	4
1. Celotex had no part in any transaction re- lied upon by the Government	5
2. No evidence of any knowing participa- tion by Celotex in any plan, combina- tion or conspiracy, if any there was	7
V. Conclusion	11

## CITATIONS

### Cases:

<i>Interstate Circuit, Inc., v. U. S.</i> , 306 U. S. 208	11
<i>Johnson v. J. H. Yost Lumber Co.</i> , 117 F. (2d) 53	11
<i>United States v. Falcone</i> , 311 U. S. 205	11
<i>United States v. Masonite Corporation</i> , 316 U. S. 265	11

# MICRO

TRADE

1192

**CARD 22**  
MARK **®**



**63**







**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1947**

**No. 13**

**THE UNITED STATES OF AMERICA,**

*vs.*

*Appellant,*

**UNITED STATES GYPSUM COMPANY; NATIONAL GYPSUM COMPANY; CERTAIN-TEED PRODUCTS CORPORATION; THE CELOTEX CORPORATION; EBSARY GYPSUM COMPANY, INC.; NEWARK PLASTER COMPANY; SAMUEL M. GLOYD, DOING BUSINESS UNDER THE NAME OF TEXAS CEMENT PLASTER COMPANY; SEWELL L. AVERY; OLIVER M. KNODE; MELVIN H. BAKER; HENRY J. HARTLEY; FREDRICK G. EBSARY; AND FREDERICK TOMKINS**

**ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR  
THE DISTRICT OF COLUMBIA**

**SUPPLEMENTAL BRIEF FOR THE CELOTEX  
CORPORATION**

**I**

**Preliminary Statement**

This supplemental brief is submitted on behalf of appellee, The Celotex Corporation, and is in addition to the general brief submitted on behalf of all appellees, including



The Celotex Corporation. This supplemental brief is not intended to duplicate any of the matters included in such general brief, to which this appellee subscribes without reservation; it will be limited to matters pertaining particularly to this appellee. To avoid unnecessary duplication, the reference to the opinion below and the statement of jurisdiction contained in such general appellees' brief are adopted to the extent that the same may be necessary.

## II

### Statement

The Celotex Corporation (hereinafter referred to as Celotex) entered the gypsum industry for the first time in 1939 when it acquired the assets of The American Gypsum Company (hereinafter referred to as American) (Fdg. 15, R. 4141; Govt. Br., pp. 11-12). In order to acquire such assets Celotex was required to take over the license which had been entered into by American with United States Gypsum Company (hereinafter referred to as USG), dated November 25, 1929 (Govt. Ex. 13, R. 4446, 4455). The terms of said license expressly obligated American to secure such assumption by a successor to its assets and business, and, accordingly, such license was acquired by Celotex on April 12, 1939, as a part of the assets of American (Govt. Ex. 14, R. 4469). At the same time, Celotex also took over as a part of the assets of American, American's license from USG, dated December 4, 1934, relating to metallized board (Fdg. 16, R. 4142).

In its answer Celotex admits that from April 12, 1939, to the date of the filing of the complaint herein (August 15, 1940) "U. S. G. has determined and fixed the minimum selling prices and terms and conditions of sale of this defendant as its licensee for all gypsum board manufactured by this defendant as its licensee under patents owned by

U. S. G. and which this defendant was licensed to utilize," and that throughout such period this appellee "has sold all gypsum board manufactured by it at the prices and on the terms and conditions of sale determined and fixed by U. S. G. as aforesaid" (R. 206). Other than as summed up in the foregoing statements, the record contains no reference to any activities of Celotex, its officers, agents, or employees.

Appellant admits that "In the nature of the case, Celotex had no part in the early negotiations" (Govt. Br., p. 89). This is manifestly true, since Celotex did not enter the gypsum industry until April, 1939.

Certain additional statements at the same page regarding this appellee, however, contain inaccuracies. The record does not support appellant's statement that C. F. Miller continued as Manager of the American Gypsum Division of Celotex after April 12, 1939. The evidence is that C. F. Miller continued with the American Gypsum Division of Celotex until July, 1940, but the record is completely silent as to the capacity in which he was employed or the title, if any, which he had (R. 1374). The admission by Celotex in its answer, referred to by appellant, that USG entered into similar agreements (similar to USG's license to American, dated Nov. 25, 1929) "with National, Universal, Atlantic, Ebsary and Certain-teed" speaks only as of the time of the filing of this appellee's answer, July 31, 1941 (R. 214), and does not admit or imply knowledge of such similarity as of any period prior to the time Celotex was required to prepare and file its answer in these proceedings, or knowledge by it at any time of any negotiations leading up to the issuance of these licenses.

## III

**Summary of Argument**

Celotex entered the gypsum business for the first time in 1939. There is no showing that Celotex was in combination, lawful or unlawful, with any other person or company in the gypsum industry, or had any connection with any other person or company in such industry except for the licenses which it acquired to use certain patents owned by USG and its operations thereunder. There is a complete lack of evidence of any knowing participation in a plan, combination or conspiracy, if any there was.

## IV

**Argument**

The argument on behalf of Celotex should not be understood as admitting directly, or by inference, the existence of any plan, combination, or conspiracy in the gypsum industry as alleged by appellant. The Court below determined that there was no such conspiracy or combination, and its conclusions (R. 4167-68) are fully supported by the evidence as shown in the general brief filed on behalf of all the appellees which this appellee has subscribed and adopts in full. However, since under the first point of its brief (Govt. Br., p. 171) appellant insists that there was an unlawful conspiracy to organize the gypsum industry and stabilize prices by means of patent license agreements, this appellee desires to point out to the Court that there is no evidence with respect to it which will support a conclusion that it was a party to any plan, combination or conspiracy, if any there was.

*1. Celotex had no part in any transaction relied upon by the Government.*

In the Government brief, counsel painstakingly review in great detail various transactions, including many letters, memoranda, and other exhibits, conversations, meetings, and activities over a long period beginning in 1925. Presumably this recital includes all the evidence relied upon by them to support their contention that there was a conspiracy or combination by erstwhile competitors to organize the gypsum industry and stabilize prices therein by means of common price-fixing license agreements.

Under Part III of the Statement, entitled "The Conspiracy" (Govt. Br., pp. 16-102), they review the matters which they contend show the conspiracy. Part III in turn is subdivided into seven parts, the first four being entitled respectively "The conspiracy in 1925-1926," "The conspiracy in 1927," "The conspiracy in 1928," and "The conspiracy in 1929." There is not even a reference to Celotex in any of the many transactions and detailed matters referred to under said headings, and obviously so, for, as conceded by the Government, Celotex did not even enter the gypsum industry until 1939, ten years after the latest alleged conspiracy (Govt. Br., pp. 11-12), and "In the nature of the case, Celotex had no part in the early negotiations" (Govt. Br., p. 89).

Subdivision E of Part III of the Statement (Govt. Br., pp. 88-89) is entitled "Concerning Texas, Newark, and Celotex"; but the Government there points out no evidence whatsoever of any negotiations, transactions or other action by Celotex subsequent to April 12, 1939, when Celotex first entered the industry, other than the admission by Celotex that its licensor, USG, determined and fixed minimum prices and terms and conditions of sale of Celotex as licensee.

Appellant sets forth only a part of this admission, but the full text is included in ~~the~~ Statement (*supra*, pp. 2-3).

In subdivision F under Part III of the Statement, entitled "The Metallized Board Licenses" (Govt. Br., pp. 90-94), the only reference to Celotex is that under date of April 12, 1939, it assumed the metallized board license from USG to American (Govt. Br., p. 94). There is no reference to any transaction or any action taken by Celotex subsequent to April 12, 1939.

And in the last subdivision in Part III, entitled "The Perforated Lath Licenses" (Govt. Br., pp. 94-102), the sole statement concerning Celotex is that it did not assume the perforated lath license between USG and American (Govt. Br., p. 101).

Under Part IV of the Statement (Govt. Br., pp. 102-160) counsel review at great length the evidence in the record which they contend shows the operation and effect of the claimed conspiracy. For the reasons stated in appellee's general brief, to which, as previously stated, we fully subscribe, we do not believe that the portions of the evidence assembled and presented by appellant in Parts III and IV of its Statement show that any conspiracy, plan or combination to organize the gypsum industry and to stabilize prices therein ever existed at any time. *A fortiori*, there could be no operation and effect of a non-existent conspiracy.

Additionally, however, we wish to call the Court's attention in this supplemental brief to the fact that in all of the detailed review of such evidence in Part IV of appellant's Statement, there is not a single reference to any act by Celotex, or to any transaction in which it is said Celotex participated, with the single possible exception that it is therein indicated that the last price bulletin issued by USG in evidence is dated June 10, 1939 (and Celotex affirms that it sold at bulletin prices in this period).



Thus, in the entire resume of the portions of the record upon which the Government relies to support its contention that a conspiracy or combination to organize the gypsum industry and stabilize prices therein was formed or existed, the only statements as to action or conduct on the part of Celotex are: (1) that on April 12, 1939, Celotex entered the gypsum business by acquiring the assets of American, among which was the general license, dated November 25, 1929, from USG to American, and the metallized board license from USG to American, dated December 4, 1934; and (2) that following the acquisition of the assets of American, USG determined and fixed the minimum selling prices and terms and conditions of sale of Celotex as the licensee of USG. It is clearly apparent that there has been no showing by the Government that Celotex ever was in combination with any other person in the gypsum industry. On the contrary, the only evidence of a connection which Celotex had, after its entry into the gypsum business, with any other person or company in the gypsum industry was the licensor-licensee relationship between Celotex and USG. Thus, there is a complete lack of proof of connection between Celotex and any other licensee in the industry. Lacking such proof, the Government cannot successfully maintain that Celotex participated in any combination or conspiracy among "appellees," if any there was.

2. *No evidence of any knowing participation by Celotex in any plan, combination or conspiracy, if any there was.*

Recognizing the complete absence of any evidence of any conduct by Celotex in either the formation of the claimed conspiracy or plan, or in any of the claimed operations thereunder, at least until after April 12, 1939, the Government apparently predicates its claim for relief against Celotex upon the theory that Celotex is claimed to have joined

and participated in the alleged conspiracy, plan or combination at that date, with knowledge thereof.

At pages 206-207 of their brief, counsel admit that acquaintance with the alleged "plan" prior to adherence thereto is a prerequisite in order to include as conspirators parties who subsequently adhere to the "plan". But the evidence relied upon by the Government as a basis for obtaining injunctive relief against Celotex falls far short of meeting this agreed test. As was shown in the preceding point, such evidence does not include a single act of "participation" on the part of Celotex subsequent to its entry into the gypsum business on April 12, 1939, with the single exception that subsequent to said date, as admitted in its answer, Celotex has observed the prices and terms and conditions of sale fixed by USG for gypsum products manufactured by Celotex as its licensee and incorporating inventions covered by some or all of the patents included in said licenses (R. 206).

The principal evidence claimed by the Government (Br., p. 89) to impute to Celotex knowledge of the claimed conspiracy or plan is that C. F. Miller, manager of American, continued as manager of the American Gypsum Division of Celotex, subsequent to April 12, 1939; and that the same Miller met with Avery in the early negotiations between American and USG and was fully conversant with the purpose, scope and effect of the licensing arrangement. As pointed out in our Statement (*supra*, p. 3), the record does not show that C. F. Miller continued or ever was manager of the American Gypsum Division of Celotex. The record is completely silent as to the capacity in which Miller continued with Celotex between April 12, 1939, and July, 1940. In the absence of any such evidence, no claim can successfully be made that any knowledge on the part of Miller can be imputed to Celotex.



The tenuous nature of appellant's argument is best demonstrated by an examination of Exhibit 310 (R. 5859), relied upon by the Government to sustain its assertions concerning the knowledge of C. F. Miller. This exhibit is wholly inadequate for such purpose. It is merely a letter by Miller, dated September 16, 1926, reporting on a conference had by Miller and other representatives of American with Ayery and other representatives of USG, concerning a proposed settlement of the patent-infringement litigation brought by USG against American. The settlement proposal was refused and American decided to go ahead and fight the litigation, which it did (R. 1378, 1380). It was not until November 25, 1929, after having lost the infringement litigation (R. 1380), that American took a license from USG (Gov. Ex. 13, R. 4446). At most, this exhibit portrays only one step in unsuccessful negotiations to settle patent litigation then pending between the two corporations.

Also in its effort to show knowledge of the claimed conspiracy on the part of Celotex at the time it entered the gypsum industry, the Government refers to portions of two admissions contained in the answer filed by Celotex (Govt. Br., p. 89). The first is an admission by Celotex that USG entered into agreements with National, Universal, Atlantic, Ebsary and Certain-teed. Reference to Paragraph 85 of said answer (R. 204) shows that the agreements referred to were licenses similar to the license agreement between USG and American, dated November 25, 1929. This admission, however, speaks only as of the date of the answer from which it has been extracted and is wholly insufficient to establish knowledge of such matters on the part of Celotex at any time prior to such answer.

Moreover, even assuming knowledge on the part of Celotex as of April 12, 1939, that other licensees had received from USG license agreements similar to that acquired by

Celotex from American, such knowledge is totally insufficient to show knowledge by Celotex of the existence of the claimed conspiracy, plan or combination asserted and charged by the Government in this case. It must always be remembered that the charges in this case, as stated under Point I of the Argument in the Government's brief (pp. 171-218), relate to a claimed conspiracy between erstwhile competitors to organize the gypsum industry and stabilize prices therein and to use the common price-fixing license agreements as a means of effectuating such conspiracy. The conspiracy alleged by the Government is understood to relate to understandings and transactions outside of, and part from, the license agreements. A mere showing of the existence of numerous similar license agreements would not sustain the Government's position, and, similarly, an admission that licenses were held by others fails to establish any knowledge of or acquaintance with the claimed conspiracy.

The other admission in the Celotex answer referred to is that from 1939 to the date of the complaint, USG has determined and fixed the minimum selling prices and terms and conditions of sale of Celotex as the licensee of USG. As shown in the Statement in this brief (*supra*, pp. 2-3), the portion quoted by the Government is incomplete. The record is that this appellee, subsequent to April 12, 1939, has sold board manufactured by it under the patents covered by the license at prices fixed by its licensor, USG. Such mere compliance with the terms and provisions of the license agreement, without which it could not have manufactured these products, has no conceivable bearing on the question of whether or not Celotex had knowledge of the claimed conspiracy, plan or combination sought to be established by the Government in this case or of any of the facts and circumstances reviewed and relied upon by the Government in its brief.

It is fundamental that, as stated by this Court, "Those having no knowledge of the conspiracy are not conspirators". *U. S. v. Falcone*, 311 U.S. 205, 210.

There is no distinction in this connection between persons acting at the time an alleged conspiracy was formed or persons whose connection with the alleged conspiracy or alleged conspirators occurs at a later date. The Circuit Court of Appeals for the 8th Circuit well stated and applied this rule in *Johnson v. J. H. Yost Lumber Co.*, 117 F. (2d) 53 (1941), where it cited this Court's decision in *Interstate Circuit, Inc., v. U.S.*, 306 U.S. 208, and said (p. 62):

"As to some of these defendants there were other reasonable explanations, but liability on their part could only result from a knowing participation in the combination of retail dealers. *Interstate Circuit v. United States*, supra. There is no evidence, direct or circumstantial, showing such knowledge. It was not enough to establish a cause of action against them to show that there was a conspiracy among the lumber dealers to prevent plaintiffs from securing supplies sold by this group of defendants, in the absence of evidence that these defendants knew there was such a conspiracy. They refused to sell plaintiffs because they feared such act would displease their other customers, causing loss of their business. They perhaps knew that other suppliers were refusing presumably for like reasons."

The foregoing ruling is singularly apt. We perceive nothing in this Court's subsequent opinion in *U.S. v. Masonite Corporation*, 316 U.S. 265, which precludes its application here.

## V

### Conclusion

It is, we believe, established beyond question that there was no conspiracy, plan or combination in the gypsum industry of the nature alleged by appellant here. The Court

below found no evidence of such a conspiracy or combination and its determinations are fully sustained by the record. The judgment based upon these findings was a dismissal of the complaint as to all defendants. It is submitted that the judgment of the Court below should be sustained. Furthermore, the judgment of the Court below should be sustained as to this appellee for the additional reason hereinabove set forth.

Respectfully submitted,

ANDREW J. DALLSTREAM,  
WALTER G. MOYLE,  
RALPH P. WANLASS,  
FREDERIC H. STAFFORD,  
*Attorneys for Appellee,*  
*The Celotex Corporation,*  
*1109 Warner Bldg.,*  
*Washington 4, D. C.*

November, 1947.

(3145)

